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No. _____

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

JEROME C. MCKNIGHT, Aviation Structural Mechanic
(Structures) Third Class, United States Navy,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS**

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QUESTION PRESENTED

Whether the United States Court of Military Appeals improperly shifted the burden of accounting for trial delays from the government to the defense, in effect, abrogating the President's policy?

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JEROME C. MCKNIGHT, Aviation Structural Mechanic
(Structures) Third Class, United States Navy,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Jerome C. McKnight, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on June 21, 1990.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. McKnight*, 30 M.J. 205 (C.M.A. 1990), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. McKnight*, No. 88-2901, slip. op. (N.M.C.M.R. Aug. 18, 1989), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps

Court of Military Review on June 21, 1990. 28 U.S.C. § 1259 (3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision affirming his conviction.

STATUTES INVOLVED

10 U.S.C. § 836, Article 36, Uniform Code of Military Justice.

(a) Pretrial, trial and post-trial procedures . . . for cases arising under this chapter triable in court-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

10 U.S.C. § 867, Article 67, Uniform Code of Military Justice. In pertinent part, Article 67 provides:

(a) (1) There is a United States Court of Military Appeals established under Article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense.

10 U.S.C. § 892, Article 92, Uniform Code of Military Justice. Failure to obey order or regulation.

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(3) . . . shall be punished as a court-martial may direct.

10 U.S.C. § 912a, Article 112a, Uniform Code of Military Justice. Wrongful use, possession, etc., of controlled substances.

(a) Any person subject to this chapter who wrongfully . . . distributes a substance described in sub-

section (b) shall be punished as a court-martial shall direct.

(b) The substances referred to in subsection (a) are the following:

(1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamines, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance

RULES FOR COURTS-MARTIAL

R.C.M. 707 (a)

(a) *In general.* The accused shall be brought to trial within 120 days after notice to the accused of the preferral of charges under R.C.M. 308 or the imposition of restraint under R.C.M. 304, whichever is earlier.

R.C.M. 707 (c) (3)

(c) *Exclusions.* The following periods shall be excluded when determining whether the period in subsection (a) of this rule has run—

(3) Any period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense.

STATEMENT OF THE CASE

Contrary to his pleas, petitioner was convicted by a military judge (bench trial) at a general court-martial for violating Articles 92 (possession of drug paraphernalia contrary to a lawful general regulation) and 112a (distribution of lysergic acid diethylamide) of the Uniform Code of Military Justice.¹ The government preferred the Article 112a offenses for trial on 7 July 1987.²

¹ 10 U.S.C. §§ 898, 912a (1982 and Supp. 1984).

² Preferral notifies a military member of pending charges.

Record at 28. An Article 32 investigation was originally scheduled for 14 July 1987.³ Appellate Exhibit I.

On 13 July 1987, civilian defense counsel requested a continuance "until after 5 August 1987 . . . I will be available until 14 August (before starting a two week vacation) and after 31 August for scheduling" of the Article 32 hearing. *United States v. McKnight*, No. 88-2901, slip op. at 2 (N.M.C.M.R. Aug. 18, 1989).

On 20 July 1987, the investigating officer responsible for conducting the pretrial hearing granted the defense-requested delay and suggested 10 or 11 August 1987 as appropriate alternative dates. Appellate Exhibit I. The Article 32 hearing was inexplicably held, however, on 11 September 1987.

At trial, petitioner moved to dismiss the drug charges because the government failed to bring him to court-martial within 120 days of preferral, as required by Rule for Courts-Martial 707.⁴ The military judge excluded all the time from 14 July (the day after the defense requested delay) to 11 September 1987 (the day of the pretrial hearing) from government accountability, thereby bringing the delay within the 120 day rule. Record at 29.

On appeal, the Navy-Marine Corps Court of Military Review agreed with petitioner's argument that the military judge erred by excluding the delay up to 11 September, but rejected petitioner's assertion that the government should be held accountable for the delay after 5 August 1987. *McKnight*, slip op. at 3. The United States Court of Military Appeals, affirming the Navy-Marine Corps Court's decision, held that the government became

³ The government conducts an Article 32 pretrial hearing to determine whether there is sufficient evidence to refer the charges to general court-martial.

⁴ Dismissal of the charges is the appropriate remedy for violation of this Rule.

accountable on 11 August 1987, because the defense did not object to that date, the investigating officer was available, and the record failed to indicate why the government could not have prosecuted its case at that time.

The decisions of the Navy-Marine Corps Court of Military Review and the Court of Military Appeals held the government accountable for a delay of only 116 days vice 122 days, thus bringing the government within the 120 day rule.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THIS WRIT BECAUSE THE COURT OF MILITARY APPEALS EXCEEDED ITS ACCEPTABLE ROLE OF INTERPRETING EXECUTIVE REGULATIONS, EFFECTIVELY ABROGATING ONE OF THE PRESIDENT'S SIGNIFICANT SPEEDY TRIAL PROVISIONS.

The issue presented here is whether the Court of Military Appeals, an Article I court ⁵ tasked to interpret executive regulations has instead, in effect, improperly abrogated a significant speedy trial provision in violation of Presidential intent. Federal courts should interpret law, not change legislative intent or executive policy.

This Honorable Court has rejected improper judicial activism by other federal courts because such overreaching violates the constitutional separation of powers principle upon which our system of government is based. See *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981); *Cf. Merrill Lynch, Pierce, Fenner, and Smith v. Curran*, 456 U.S. 353, 102 S. Ct. 1825, 72 L. Ed 182 (1982) (Powell, J., dissenting).⁶ In *City of Milwaukee*, Justice Rehnquist emphasized that the federal courts must assume that Congress, not the courts, will articulate policy and stand-

⁵ 10 U.S.C. § 867 (1982).

⁶ Chief Justice Burger, Justice Rehnquist, and Justice O'Connor joined in this dissent.

ards to be applied as a matter of federal law. *City of Milwaukee*, 451 U.S. at 317, 101 S. Ct. at 1792, 68 L. Ed. 2d at 126. The Court further held that its "commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem." *City of Milwaukee*, 451 U.S. at 315, 101 S. Ct. at 1791-92, 68 L. Ed. 2d 125 (internal quotations and citations omitted).

Congress, through Article 36, Uniform Code of Military Justice, explicitly authorized the President to promulgate rules for the administration of courts-martial.⁷ In 1984, the President promulgated Rule for Courts-Martial 707, the procedural rule which requires that an accused be brought to court-martial within 120 days after notification of the charges against him.

Rule 707's underlying premise is that *the government is accountable for every day* after notifying the accused, *unless* a period of time is excluded under Rule for Courts-Martial 707(c). The government, in order to be relieved of this responsibility, must prove that certain times are excluded from its accountability under Rule for Courts-Martial 707(c).

The Court of Military Appeals has, in the past, properly interpreted the Executive's intent.⁸ However, here,

⁷ 10 U.S.C. § 836 (1982).

⁸ This Court can better appreciate the lower Court's departure from its traditional judicial role by considering recent cases interpreting R.C.M. 707.

In *United States v. Carlisle*, 25 M.J. 426 (C.M.A. 1988), the Court of Military Appeals, affirming the decision of the Navy-Marine Corps Court of Military Review, held that a delay in the Article 32 investigation was not excluded from government accountability in the absence of an "express request for delay from the accused." *Carlisle*, 25 M.J. at 427.

In *United States v. Burris*, 21 M.J. 140 (C.M.A. 1985), as well as *Carlisle*, the defense counsel either suggested or consented infor-

the Court of Military Appeals held that "the defense is not entitled to ask that a pretrial hearing under Article 32 be delayed until a certain date and then insist that the Government proceed on that very day." *McKnight*, 30 M.J. at 208. Petitioner did not expect the government to proceed on that very day. However, petitioner correctly expected the government to become accountable on that very day because he did not request or consent to any delay after that date.

The Court further ruled that after requesting a delay, the defense has "some obligation to cooperate reasonably in rescheduling the proceeding." *Id.* This record contains no evidence that petitioner failed to "cooperate reasonably." Reasonable cooperation, however, should not require affirmative action by an accused to cause the government to take steps toward trial. Such a requirement would shift the burden for bringing an accused to trial to the defense, a policy not consistent with R.C.M. 707's express language, or prior decisions interpreting the Rule's requirement. An accused must now either request a continuance for a limited "window" of time and accept responsibility for the entire period, or proceed to trial ill-prepared.

The decision below, purporting to interpret the "with the consent of the defense" clause of R.C.M. 707, in effect amounted to an abrogation of the clause. Simply put, the Court of Military Appeals decided what the Executive's speedy trial policy "ought to be," rather than what "it is." This significant departure from the customary judicial role amounted to repeal by judicial fiat. The President's rule, properly interpreted, would have attributed

mally to a trial date outside the 120 day limit. The Court of Military Appeals, in *Burris*, reiterated the purpose of R.C.M. 707(c) and found that defense "consent" to delay must be explicit and not mere acquiescence. These cases were consistent with the executive branch's policy that the government would be responsible for *every day* after notification of charges.

delay to the defense until the date it requested (August 5th) and would have made the government bear the burden for delay between August 6th and the date the hearing actually occurred. The President has decided that the defense has no responsibility to assist the government in bringing the case to trial.

CONCLUSION

The decision of the Court of Military Appeals in this case has abrogated the Presidential policy underlying his speedy trial rule. This case gives this Court the opportunity to address judicial activism by an Article I court in the same manner as it has previously addressed abuses by Article III courts.

Respectfully submitted,

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APPENDICES



APPENDIX A
U.S. COURT OF MILITARY APPEALS

No. 63,269
NMCM 88-2901

UNITED STATES, APPELLEE

v.

JEROME C. MCKNIGHT, Aviation Structural Mechanic
(Structures) Third Class, U.S. Navy, APPELLANT

June 21, 1990

Opinion of the Court

EVERETT, Chief Judge:

Contrary to his pleas, McKnight was convicted by military judge sitting alone as a general court-martial of violating Articles 92 and 112a of the Uniform Code of Military Justice, 10 USC §§ 892 and 912a, respectively. The sentence adjudged was a dishonorable discharge, confinement for 8 years, total forfeitures, and reduction to pay grade E-1. The convening authority reduced the confinement by 18 months but otherwise approved the sentence. After the Court of Military Review had affirmed the findings and sentence in an unpublished opinion dated August 18, 1989, we granted appellant's petition for review on these issues:

(1a)

I

WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED IN EXCLUDING DAYS BETWEEN 5 AUGUST 1987 AND 11 AUGUST 1987 FROM THE TIME CHARGEABLE TO THE GOVERNMENT UNDER R.C.M. 707, THEREBY DENYING APPELLANT'S RIGHT TO SPEEDY TRIAL ON SPECIFICATIONS 6 AND 8 OF CHARGE II.

II (specified)

WHETHER THE CONVENING AUTHORITY ABUSED HIS DISCRETION WHEN HE APPROVED THE FINDINGS OF GUILTY TO CHARGE I AND ITS SPECIFICATION (VIOLATION OF A LAWFUL GENERAL REGULATION BY WRONGFUL POSSESSION OF DRUG PARAPHERNALIA), THOUGH THE STAFF JUDGE ADVOCATE HAD RECOMMENDED THAT HE NOT APPROVE SUCH FINDINGS BECAUSE THE EVIDENCE WAS NOT INSUFFICIENT TO ESTABLISH THE GUILT OF THE ACCUSED AS A MATTER OF LAW.

III (specified)

WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHEN IT AFFIRMED THE FINDINGS OF GUILTY TO CHARGE I AND ITS SPECIFICATION (VIOLATION OF A LAWFUL GENERAL REGULATION BY WRONGFUL POSSESSION OF DRUG PARAPHERNALIA).

We decide for the Government on all three issues.

I

When trial commenced on January 6, 1988, the defense moved to dismiss Charge II and all specifications there-

under. Ultimately, the military judge granted this motion as to those specifications that had originally been preferred in February and March 1987 and then repreferred on July 7, 1987. However, the judge denied the motion as to those specifications which had been initially preferred on July 7; and the issue before us concerns the correctness of that ruling.

According to the chronology agreed upon by the parties at trial, trial counsel had proposed to the defense on July 9, that the Article 32, UCMJ, 10 USC 832, investigation on all the pending charges be scheduled for July 14; and he noted that the investigating officer would "be available on that day." On July 13, McKnight's civilian defense counsel wrote the investigating officer to this effect:

I understand the military charges against AMS3 Jerome McKnight, formerly dismissed, have been revived and are pending first an Article 32 Hearing. I have conferred with Lt. Hackett about the selection of a mutually convenient date for that hearing. Lt. Hackett is Trial Counsel for the government in this case. I informed him however that the co-pending civil criminal charges in Circuit Court, St. Mary's County, are set for trial August 5, 1987 and further that Lt. Kirschner, formerly military counsel assisting the defense of Airman McKnight, will be withdrawing due to another military assignment he recently received. In view of these two circumstances I suggested to Lt. Hackett that it might be more prudent to permit the civilian trial to be concluded and the results therein obtained before proceeding with the military charges since the latter conceivably may not be necessary depending upon the outcome in the civilian trial. I told Lt. Hackett also that although I am a former Army JAG officer, I am not familiar with the new Article 32 procedures in the military justice system and in that regard have re-

requested Lt. Kirschner to obtain appointment of a military attorney to assist with the defense. I understand this might take some time to accomplish.

Accordingly, I suggested to Lt. Hackett my intention to respectfully seek deferment of the Article 32 proceedings until after August 5, 1987 and the outcome in the civilian trial and after assignment of new military counsel to assist the defense. Consequently, please accept this letter as a request for deferment until after August 5, 1987 of the Article 32 hearing. I will be available until August 14th (before starting a two week vacation) and after August 31st for scheduling of that hearing.

The investigating officer replied on July 20, 1987:

Due to the problems inherent in assigning new defense counsel to replace Lieutenant Kirshner, your request is granted. Lieutenant Hackett will act as liaison in establishing a new date for the investigation. I would suggest that August 10 or 11 might be appropriate alternate dates.

Although the defense made no objection to the dates proposed by the investigating officer, no pretrial hearing took place until September 11; and the report of investigation under Article 32 was not completed until October 6. On October 26, the charges were referred to a general court-martial; and on November 12, trial counsel requested November 30 as a trial date. On November 25, McKnight requested a continuance until January 6—when the trial began.

From the 183 days which had elapsed between July 7—when charges had been preferred and notice thereof given to appellant—and the date of trial, the military judge subtracted two periods, which he attributed to the defense. The first was from July 14, 1987, until September 11, 1987—a period of 59 days; and the second from November 30, 1987, until January 6, 1988—37 days.

With these days subtracted, the Government was well within the 120 days authorized by RCM 707, Manual for Courts-Martial, United States, 1984.

The Court of Military Review concluded that the Government, rather than the defense, should be charged with the delay from August 11 to September 11. However, even with this increased accountability, the Government was just within the 120-day period.

The defense, on the other hand, claims that the Government was accountable for any delay during that period after August 5. If this contention is accepted, the period of delay chargeable to the Government is 124 days; the time allowed by RCM 707 for getting to trial was exceeded; and the charges should have been dismissed.

As we construe the request for delay contained in the letter from civilian defense counsel, the Government was being asked to postpone the pretrial hearing until a date between August 6 and August 14; and defense counsel was willing to participate in the hearing at any time during that period. Presumably, defense counsel was suggesting a period of several days when he could appear, rather than some single day, in order to make his request for delay less onerous to the Government and therefore more likely of acceptance. If the investigating officer had responded that the hearing would take place on August 14 and had started the hearing on that day, the Government's accountability for delay would have resumed at that time—rather than as of August 5, the earliest date when the defense counsel had indicated that he would be ready to proceed.

In our view, the defense is not entitled to ask that a pretrial hearing under Article 32 be delayed until a certain date and then insist that the Government proceed on that very day. The investigating officer or necessary witnesses may not have been available; or trial counsel may have had court commitments. Defense counsel has no af-

firmative obligation to move the case to trial. However, when trial or some earlier proceeding is delayed for his convenience or needs, he does have some obligation to cooperate reasonably in rescheduling the proceeding. See generally *United States v. Longhofer*, 29 MJ 22 (CMA 1989). The Government may insist on some flexibility in scheduling as a condition for granting a defense request for delay.

However, when the investigating officer suggested that he was available to conduct the pretrial hearing on August 10 and 11—and absent any indication that these dates would not be satisfactory for trial counsel—we see no reason why the Government's accountability should not resume on August 11, as the Court of Military Review held. See *United States v. Burris*, 21 MJ 140, 144 (CMA 1985). Accord *United States v. Longhofer*, *supra* at 25; *United States v. Cheroke*, 22 MJ 438, 439 (CMA 1986).¹ Since the defense was ready to proceed on August 11² and the investigating officer was available and since civilian defense counsel asserted without contravention that there was no indication in the record why the Government could not have presented its case at the pretrial hearing on that date, we believe that, from that time forward, the responsibility for pretrial delay again was with the Government.

¹ It might be argued that August 10, rather than the 11th, should be selected as the date on which the clock started to run again. However, to use the earlier date would not affect the result here.

² Appellate Exhibit XX is a motion filed by this same civilian defense counsel in St. Mary's County, Maryland, Circuit Court, requesting a continuance in the trial in that court from August 5 to September 1987. Conceivably, inasmuch as civilian defense counsel earlier had indicated a desire to continue the Article 32 investigation until sometime after the civilian trial in St. Mary's County, this motion might imply that civilian defense counsel was not ready to proceed with the Article 32 hearing on August 11. However, inexplicably this was not raised or argued at trial, so we decline to speculate on it here.

We realize that the selection of August 11 is dependent on our interpretation of the correspondence between defense counsel and the investigating officer and the absence of other information about causes of delay. Perhaps the correspondence might be susceptible of some other interpretation more favorable to appellant's speedy-trial contentions. However, we see no reason to construe any ambiguity in the correspondence against the Government, because that ambiguity is, at least in part, attributable to defense counsel³ and also because the adverse consequences to the Government—dismissal of the charges—are so great. We conclude, therefore, that it was proper that the charges of which McKnight was convicted were not dismissed on speedy-trial grounds.

II

In his post-trial recommendation, the district judge advocate advised the convening authority that he was

not personally convinced that the evidence presented at trial concerning Charge I and the sole specification thereunder (wrongful possession of drug paraphernalia—two homemade marijuana smoking devices) established the accused's guilt to that offense beyond a reasonable doubt. My personal assessment of the evidence presented at trial causes me to believe that possession on the premises where the search was conducted was nonexclusive rather than exclusive. . . . I therefore recommend that you set aside and dismiss the findings of guilty to Charge I and the sole specification thereunder, and that the confinement portion of the sentence be reduced from 8 years to 7 years. *Of course, these are my personal judgments and not legal objections, and you are*

³ See generally *United States v. Cherok*, 22 MJ 438, 440 (CMA 1986) ("If the defense needed a continuance, it should have been requested on the record and not handled in off-the-record negotiations.")

free to follow or not as you in your sole discretion determine in your review of the case.

After considering the district judge advocate's recommendation, the convening authority chose to approve all the findings of guilty, as they had been rendered by the military judge; and he approved the sentence except for reducing the confinement to 6½ years. Appellant now complains that the convening authority was obligated at least to explain the reasons for his refusal to accept the recommendation of his district judge advocate.

It seems clear from the language employed that the district judge advocate was giving his personal evaluation of the evidence pertinent to Charge I and its specification, rather than seeking to advise the convening authority as to the legal sufficiency of the Government's evidence. However, even if the district judge advocate had intended to express a legal opinion that the Government's evidence was insufficient, the convening authority was free to disregard that opinion—even without stating his reasons for doing so.

Prior to enactment of the Military Justice Act of 1983⁴—which, among other things, sought to streamline military appellate review procedures—a staff judge advocate was required to prepare an extensive legal review in cases where a punitive discharge or extensive confinement had been adjudged. If the convening authority refused to accept the legal advice of the staff judge advocate, he was required to give his reasons for doing so.

However, under the 1983 legislation, as implemented by the 1984 Manual for Courts-Martial, the staff judge advocate need not prepare any legal review, *see generally* Art. 60(d), UCMJ, 10 USC § 860(d) (requiring only a recommendation of the staff judge advocate); and the convening authority's role is limited to clemency, *see* Art. 60(c)(1) and (3); H. Rep. No. 549, 98th Cong.,

⁴ Pub.L. No. 98-209, § 5(a)(1), 97 Stat. 1393, 1396-97 (1983).

1st Sess. 18-19 (1983); S.Rep. No. 53, 98th Cong., 1st Sess. 19-20 (1983); U.S. Code Cong. & Admin. News 1983, pp. 2177, 2183, 2184. *See also* RCM 1106 and 1107, Manual, *supra*. The premise is that significant legal error ultimately can be corrected by the Court of Military Review or, if not there, by a petition for review to this Court.

Consistent with the new statutory provisions, we are convinced that the convening authority was free to act as he did; and the real question is whether the evidence in support of Charge I is legally sufficient. We now turn to consideration of that matter.

III

This Court has no factfinding powers in reviewing the sufficiency of evidence to support a conviction. *See* Art. 67(d), UCMJ, 10 USC § 867(d). Our role is only to decide whether we "can legally sustain findings of guilty entered by a court-martial and affirmed by a Court of Military Review." *United States v. Seger*, 25 MJ 420 (CMA 1988); *United States v. Carter*, 24 MJ 280, 281 (CMA 1987); *United States v. Harper*, 22 MJ 157, 161 (CMA 1986). *See also* Art. 67(d).

The Government's theory of guilt was that appellant had violated a regulation by his possession of drug paraphernalia—a metal pipe and plastic tape pipe. For these purposes, it was necessary for the Government to show only that McKnight was in a position to exercise control over these items, either directly or through others. *United States v. Wilson*, 7 MJ 290 (CMA 1979). Two or more persons may have possession of the same item, *United States v. Aloyian*, 16 USCMA 333, 36 CMR 489 (1966); and possession of contraband may be established by circumstantial evidence. *See United States v. Wilson*, *supra* at 293.

The testimony of several law-enforcement officers established that the marijuana pipes were found in Mc-

Knight's house in his bedroom when a search warrant was executed. During the same search, other items were discovered—such as drugs, money, and personal papers belonging to McKnight—which confirmed that he resided in the house and had control over it. His name was on the mailbox at the house; and even though another name, "Amadio," also was on the mailbox, this fact does not negate his control over the house.

Under these circumstances, we conclude that appellant's possession was adequately established as a matter of law, so the findings of guilty should be affirmed.

IV

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

NMCM 88 2901

UNITED STATES

v.

JEROME C. McKNIGHT, 146 64 8825
Aviation Structural Mechanic
(Structures) Third Class (E-4), U. S. Navy

Decided 18 August 1989

Before: E. M. ALBERTSON, R. A. STRICKLAND,
J. E. RUBENS.

Sentence adjudged 7 January 1988. Military Judge:
E. D. Clark. Review pursuant to Article 66(c), UCMJ,
of General Court-Martial convened by Commandant,
Naval District Washington, DC, Washington Navy Yard,
Washington, DC 20374-2002.

LT J. A. TOLIVER, JAGC, USNR, Appellate Defense
Counsel

LT ROSALYN D. CALBERT, JAGC, USNR, Appellate
Government Counsel

PER CURIAM:

Contrary to his pleas, appellant was convicted by a
military judge sitting alone as a general court-martial of
violating Articles 92 and 112a, Uniform Code of Mili-

tary Justice (UCMJ), 10 U.S.C. §§ 892 and 912a. The military judge sentenced appellant to confinement for 8 years, forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge. The convening authority approved the discharge, forfeiture, and reduction, but reduced the confinement to 6½ years. Appellant has raised three issues on appeal.¹ We do not find merit in any of these issues and will discuss only the speedy trial issue.

At trial, appellant moved to dismiss the Article 112a charge and the accompanying twelve specifications because he was denied a speedy trial. The military judge granted the motion as to seven of the twelve² specifications because appellant had not been brought to trial within the 120-day period prescribed by Rule for Courts-Martial (R.C.M.) 707(a), Manual for Courts-Martial (MCM), United States, 1984, after excluding delays attributable to the defense. Appellant now argues that the military judge erred in not dismissing the other specifications of the Article 112a charge.

The specification of the Article 112a charge of which appellant was convicted were preferred and notice was given on 7 July 1987. The trial commenced on 6 January 1988. This means that there were 183 days between notice of preferral and the date of trial. There are two periods of delay which the military judge found chargeable to the defense: (1) from 30 November 1987 until 6 January 1988 the defense requested and was granted a continuance, a period of 38 days; and (2) from 14

¹ The three issues are: (1) Denial of the Right to a Speedy Trial, (2) Failure of the Government to Prove Appellant's Guilt of the Article 92, UCMJ, Violation as to Charge I and its Specification Beyond a Reasonable Doubt, and (3) Inappropriately Severe Sentence to Confinement.

² Of the five remaining specifications, the appellant was convicted of only two.

July 1987 until 11 September 1987 the defense requested and the investigating officer granted a delay in the Article 32, UCMJ, pretrial investigation, a period of 60 days. We find, however, that the military judge erred in finding that the entire period from 5 August 1987 until 11 September 1987 was chargeable to the defense.

The Article 32 investigation was originally scheduled for 14 July 1987; however, on 13 July 1987 the civilian defense counsel requested from the investigating officer a continuance "until after Aug. 5, 1987 I will be available until August 14th (before starting a two week vacation) and after August 31st for scheduling of that hearing." This continuance was requested so that pending civilian charges against appellant could be resolved and to allow for the appointment of a new military defense counsel. The investigating officer granted the request on 20 July 1987 and suggested 10 or 11 August as "appropriate alternate dates." There is no explanation in the record why either of these two dates were not utilized and why the Article 32 investigation was not held until 11 September 1987.

The military judge determined that because a new defense counsel was not appointed by the convening authority until 10 September 1987, the defense should be charged with this entire period of delay. On appeal the appellant has submitted an affidavit from the detailed defense counsel which states that he was detailed as early as the first week in August and that he was prepared for the Article 32 investigation any time during the period which the civilian defense counsel had set forth in his continuance request. Focusing on the date on which a new defense counsel was appointed, however, is incorrect.

The first reason why this is incorrect is because it is incredible and not acceptable that the Government would take from 13 July 1987 until 10 September 1987, a total of 59 days, to appoint a new detailed defense counsel to

represent appellant at the Article 32 investigation.³ This inordinate delay should not be charged against the appellant since he has the right to a detailed defense counsel at the pretrial investigation. R.C.M. 405(d)(2) and 405(f)(4), MCM, 1984. Second, and more importantly, the civilian counsel's request for a continuance provided a definite time window in which the pretrial investigation could be rescheduled and limited the delay chargeable to the defense for the continuance. The investigating officer acknowledged the window and provided two alternate dates that were within this window. The defense can only be charged with delay occasioned by its continuance request and which is evidenced on the record. See *United States v. Carlisle*, 25 M.J. 426, 428 (C.M.A. 1988); see also *United States v. Butterbaugh*, 22 M.J. 759, 761 (NMCMR 1986) (the defense is under no obligation to speed a case along to trial and defense silence cannot be viewed as an implicit request for delay). Accordingly, we find that the defense is only accountable for the time from which the pretrial investigation was continued, 14 July 1987, until the later of the two dates chosen by the investigating office. to proceed with the investigation, 11 August 1987, a delay of 28 days.

The military judge found, and we concur, that the appellant was brought to trial 183 days after being notified of preferred charges. He also found that the 38-day delay in the trial was accountable to the appellant. We have determined that only 28 days can be charged as defense delay in the pretrial investigation. Thus, the total delay which can be charged to the appellant is 66 days (28 plus 38). Therefore, we find that appellant was brought to trial 117 days after being notified of preferred charges, and he was not denied his right to a speedy trial under R.C.M. 707, MCM, 1984.

³ The original detailed defense counsel was relieved because of a change in duty assignments and, therefore, a new detailed defense counsel had to be appointed.

We are convinced beyond a reasonable doubt as to the appellant's guilt of the offense of which he was convicted. Article 66(c), UCMJ. Accordingly, the findings and the sentenced approved on review below are hereby affirmed.

/s/ E. M. Albertson
E. M. ALBERTSON
Senior Judge

/s/ (Absent)
R. A. STRICKLAND
Judge

/s/ J. E. Rubens
J. E. RUBENS
Judge